

FACTUAL HISTORY

On September 30, 1996 appellant, then a 65-year-old distribution clerk, filed an occupational disease claim alleging that she developed bilateral carpal tunnel syndrome as a result of repetitively casing mail in the performance of duty. She stopped work on September 20, 1996. OWCP accepted appellant's claim for bilateral carpal tunnel syndrome. Appellant was placed on the periodic rolls. On March 21, 1997 she returned to full-time limited duty. The record reveals that appellant began receiving SSA annuity at age 67.

Commencing October 2, 2010, OWCP accepted appellant's recurrence claim as the employing establishment could no longer accommodate her with restrictions and returned her to the periodic rolls.

Beginning July 30, 2011, OWCP began offsetting the SSA payments from appellant's compensation payments.

On September 13, 2011 OWCP requested from SSA information regarding whether appellant was receiving dual benefits under both workers' compensation and SSA.

By letter dated September 14, 2011, OWCP advised appellant that under FECA a claimant's continuing compensation benefits should be reduced if he or she begins receiving SSA retirement benefits based on his or her age and federal service. It noted that she had received FECA payments without the SSA retirement benefits reduction and informed her that she may receive a notification in the future concerning any overpayment amount owed. OWCP provided the calculations for compensation payments under her current pay rate.

In a form dated September 23, 2011, SSA provided a calculation regarding receipt of appellant's SSA benefits with and without Federal Retirement Employee System (FERS) benefits from November 1997 through December 2010.

OWCP reported that according to the information provided by SSA from October 20, 2010 to July 29, 2011 appellant had received \$1,931.60 a month with FERS but should have received \$616.00 without FERS. It noted that the monthly offset equaled \$1,315.60 or \$1,214.40 for every 28 days ($1,315.60 \times 12/13 = 1,214.4$). The FERS offset amount was divided by 28 to determine the daily amount of \$43.37. OWCP multiplied the daily offset of \$43.37 by 283 days, the number of days from October 20, 2010 to July 29, 2011 and found that appellant received an overpayment of \$12,274.11.

On October 22, 2012 OWCP made a preliminary determination that appellant had received an overpayment of compensation in the amount of \$12,274.11 because she had been paid full workers' compensation benefits concurrent with social security benefits. This resulted in an overpayment for the period October 20, 2010 to July 29, 2011. OWCP found that appellant was without fault in the creation of the overpayment. It informed her that she had 30 days to request a telephone conference, a final decision based on the written evidence or a prerecoupment hearing on the issue of possible waiver of the overpayment. OWCP requested that appellant complete and return an enclosed financial information questionnaire (Form OWCP-20) within 30 days even if she was not requesting waiver of the overpayment.

On November 20, 2012 appellant submitted an overpayment action request form.² She stated that her SSA benefits were not disability retirement because she was due social security based on her age. Appellant explained that she was entitled to work and receive SSA benefits.

In a letter dated December 19, 2012, OWCP advised appellant that a prerecoupment hearing was scheduled for February 5, 2013 at 9:45 a.m. Appellant was provided a toll-free number to call at the allotted time and a passcode to enter.

Appellant retired from federal service effective January 31, 2013.

By decision dated February 22, 2013, OWCP's hearing representative finalized the finding of overpayment in the amount of \$12,274.11 for the period October 20, 2010 to July 29, 2011. He determined that appellant was without fault in the creation of the overpayment but was not entitled to waiver of recovery. The hearing representative noted that appellant did not provide any financial evidence. He also found that she continued to receive compensation benefits of \$1,904.00 per month and that a recoupment of \$300.00 per month would not constitute a financial hardship. The hearing representative also found that appellant abandoned the telephonic prerecoupment hearing scheduled for February 5, 2013.

LEGAL PRECEDENT -- ISSUE 1

Section 8102(a) of FECA provides that the United States shall pay compensation for the disability or death of an employee resulting from personal injury sustained while in the performance of duty.³

Section 8116(d)(2) of FECA requires that compensation benefits be reduced by the portion of SSA benefits based on age or death that are attributable to federal service and that, if an employee receives SSA benefits based on federal service, his or her compensation benefits shall be reduced by the amount of SSA benefits to his or her federal service.⁴

OWCP's procedures provide that, while SSA benefits are payable concurrently with FECA benefits, the following restrictions apply: in disability cases, FECA benefits will be reduced by SSA benefits paid on the basis of age and attributable to the employee's federal service.⁵ The offset of FECA benefits by SSA benefits attributable to employment under FERS is calculated as follows: where a claimant has received SSA benefits, OWCP will obtain information from SSA on the amount of the claimant's benefits beginning with the date of eligibility to FECA benefits. SSA will provide the actual amount of SSA benefits received by the claimant/beneficiary. SSA will also provide a hypothetical SSA benefit computed without

² Appellant did not indicate whether she chose a telephone conference with the district Office, a decision based on the written evidence or a prerecoupment hearing with the Branch of Hearings and Review.

³ 5 U.S.C. § 8102(a).

⁴ *Id.* at § 8116(d). See *G.B.*, Docket No. 11-1568 (issued February 15, 2012); see also *Janet K. George*, 54 ECAB 201 (2002).

⁵ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Dual Benefits*, Chapter 2.1000.4(a) (February 1995); Chapter 2.1000.1.11(b) (February 1995); see also *R.C.*, Docket No. 09-2131 (issued April 2, 2010).

the FERS-covered earnings. OWCP will then deduct the hypothetical benefit from the actual benefit to determine the amount of benefits which are attributable to federal service and that amount will be deducted from FECA benefits to obtain the amount of compensation payable.⁶

ANALYSIS -- ISSUE 1

Appellant received FECA wage-loss compensation and SSA benefits from October 20, 2010 to July 29, 2011. As previously stated, the portion of the SSA benefits she earned as a federal employee as part of her FERS retirement package and the receipt of benefits under FECA and FERS benefits concurrently is a prohibited dual benefit.⁷ OWCP requested and SSA provided information regarding appellant's applicable SSA rates and their effective dates. Based on these rates, it determined that the prohibited dual benefit appellant received from October 20, 2010 to July 29, 2011, created an overpayment of compensation in the amount of \$12,274.11.

The Board has reviewed OWCP's calculations of the dual benefits appellant received for the period October 20, 2010 to July 29, 2011 and finds that OWCP properly determined that she received dual benefits totaling \$12,274.11 for this period, thus creating an overpayment in compensation in that amount.

LEGAL PRECEDENT -- ISSUE 2

Section 8129 of FECA provides that an individual who is without fault in creating or accepting an overpayment is still subject to recovery of the overpayment unless adjustment or recovery would defeat the purpose of FECA or would be against equity and good conscience.⁸

Recovery of an overpayment will defeat the purpose of FECA if such recovery would cause hardship to a currently or formerly entitled beneficiary because the beneficiary from whom OWCP seeks recovery needs substantially all of his or her current income, including compensation benefits, to meet current ordinary and necessary living expenses and the beneficiary's assets do not exceed a specified amount as determined by OWCP.⁹ Additionally, recovery of an overpayment is considered to be against equity and good conscience when any individual who received an overpayment would experience severe financial hardship in attempting to repay the debt or when any individual, in reliance on such payment or on notice that such payments would be made, gives up a valuable right or changes his or her position for the worse.¹⁰

⁶ See *P.G.*, Docket No. 13-589 (issued July 9, 2013); FECA Bulletin No. 97-9 (issued February 3, 1997).

⁷ *Id.*

⁸ *Id.* at § 8129(b); 20 C.F.R. §§ 10.433, 10.434, 10.436 and 10.437.

⁹ 20 C.F.R. § 10.436(a)(b). For an individual with no eligible dependents the asset base is \$4,800.00. The base increases to \$8,000.00 for an individual with a spouse or one dependent, plus \$960.00 for each additional dependent. Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6(a)(1)(b) (June 2009).

¹⁰ *Id.* at § 10.437(a)(b).

The individual who received the overpayment is responsible for providing information about income, expenses and assets as specified by OWCP. This information is needed to determine whether or not recovery of an overpayment would defeat the purpose of FECA or be against equity and good conscience. This information will also be used to determine the repayment schedule, if necessary.¹¹

ANALYSIS -- ISSUE 2

OWCP found that appellant was without fault in the creation of the overpayment, but denied waiver. The fact that appellant was without fault does not preclude OWCP from recovering all or part of the overpayment. As previously noted, OWCP's regulations provide that the individual who received the overpayment is responsible for providing information about income, expenses and assets as specified by OWCP. Failure to submit the required information within 30 days of the request shall result in the denial of waiver and no further request for waiver shall be considered until the requested information is furnished.¹²

By letter dated October 22, 2012, OWCP notified appellant that she received SSA benefits concurrent with her workers' compensation benefits from October 20, 2010 until July 29, 2011, resulting in an overpayment of compensation. It asked her to complete an enclosed financial information questionnaire (Form OWCP-20) within 30 days and to submit any financial information that would support waiver of recovery of the overpayment. On November 20, 2012 appellant requested waiver of recovery of the overpayment, but did not submit any financial information.

The Board notes that appellant did not submit a completed OWCP-20 form nor any other financial information within the 30 days provided.¹³ Therefore, the Board finds that OWCP properly refused her request for waiver of recovery of the overpayment under the implementing federal regulations because it was precluded from evaluating her eligibility for waiver of the overpayment absent the submission of such financial information. Thus, OWCP did not abuse its discretion by denying waiver of recovery of the overpayment.

LEGAL PRECEDENT -- ISSUE 3

Section 8129(a) of FECA provides, in pertinent part, that when an overpayment has been made to an individual under this subchapter because of an error of fact or law, adjustment shall be made under regulations prescribed by the Secretary of Labor by decreasing later payments to which an individual is entitled.¹⁴ OWCP's implementing regulations provide that, if an overpayment of compensation has been made to an individual entitled to further payments and

¹¹ *Id.* at § 10.438(a); *Ralph P. Beachum, Sr.*, 55 ECAB 442 (2004).

¹² *Id.* at § 10.438(a)(b).

¹³ Appellant submitted financial records to the Board on appeal. The Board's Rules of Procedure however limit the Board's review of a case to the evidence that was before OWCP at the time of its decision. 20 C.F.R. § 501.2(c)(1).

¹⁴ 5 U.S.C. § 8129.

no refund is made, OWCP shall decrease later payments of compensation, taking into account the probable extent of future payments, the rate of compensation, the financial circumstances of the individual and any other relevant factors, so as to minimize any hardship.¹⁵

ANALYSIS -- ISSUE 3

The Board finds that OWCP properly directed recovery of the overpayment at the rate of \$300.00 per month from each continuing compensation payment.

Regarding the recovery of the overpayment from appellant's continuing compensation, the Board notes that she did not provide any financial information which would assist OWCP in determining her financial circumstances to minimize any hardship. OWCP properly set the rate of recovery at \$300.00 from each continuing compensation payment until the benefit was paid in full. The Board finds that this was reasonable in the absence of any financial documentation proving otherwise.¹⁶

On appeal, appellant alleges that she did not receive the OWCP-20 form with the December 19, 2012 letter and submitted the completed questionnaire form on appeal. The Board's jurisdiction however is limited to evidence that was before OWCP at the time it issued its final decision.¹⁷ Because this evidence was not in the case record at the time OWCP rendered its final February 22, 2013 decision, the Board is precluded from considering such evidence on appeal.

LEGAL PRECEDENT -- ISSUE 4

With respect to abandonment of hearing requests, Chapter 2.1601.6(g) of OWCP's procedure manual provides in relevant part that failure of the claimant to appear at the scheduled hearing, failure to request a postponement and failure to request in writing within 10 days after the date set for the hearing that another hearing be scheduled shall constitute abandonment of the request for a hearing. Under these circumstances, the Branch of Hearings and Review will issue a formal decision finding that the claimant has abandoned his or her request for a hearing and return the case to the district Office. In cases involving prerecoument hearings, the Branch of Hearings and Review will also issue a final decision on the overpayment, based on the available evidence, before returning the case to the district Office.¹⁸

ANALYSIS -- ISSUE 4

In a letter dated December 19, 2012, OWCP advised appellant of a scheduled telephonic prerecoument hearing with an OWCP hearing representative at a specific time on

¹⁵ 20 C.F.R. § 10.441(a).

¹⁶ *Id.*

¹⁷ *Id.* at § 501.2(c); *Sandra D. Pruitt*, 57 ECAB 126 (2005).

¹⁸ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearings and Review of the Written Record*, Chapter 2.1061.6(g) (October 2011); *see also* 20 C.F.R. § 10.622.

February 5, 2013. The evidence establishes that OWCP mailed appropriate notice to the claimant at her last known address. The record also reveals that appellant did not request postponement, failed to appear for the scheduled hearing and failed to provide any notification for such failure within 10 days of the scheduled date of the hearing. As this meets the conditions for abandonment of a hearing as specified by OWCP's regulations and procedure manual, the Board finds that OWCP properly found that she abandoned her request for a prerecoupment hearing before an OWCP hearing representative and properly issued a final decision on the overpayment of compensation. The Board will affirm OWCP's decision that appellant abandoned her request for a prerecoupment hearing.

On appeal, appellant alleges that she never received the December 19, 2012 letter. The Board has found that a notice properly addressed and duly mailed to an individual in the ordinary course of business is presumed to have been received by that individual.¹⁹ Thus, the Board finds that absent any evidence to the contrary appellant received proper notice of the scheduled February 5, 2013 telephonic hearing.

CONCLUSION

The Board finds that appellant received an overpayment of compensation in the amount of \$12,274.11. OWCP properly denied waiver and required recovery of the overpayment by deducting \$300.00 every 28 days from her continuing compensation payments. The Board also finds that OWCP properly found that appellant abandoned her request for a prerecoupment hearing.

¹⁹ *J.R.*, Docket No. 13-313 (issued August 15, 2013); *Newton D. Lashmett*, 45 ECAB 181 (1993) (mailbox rule).

ORDER

IT IS HEREBY ORDERED THAT the February 22, 2013 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 6, 2014
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board